

CLAIMS INVOLVING FRAUD: CONTRACTING OFFICER RESTRICTIONS

I. INTRODUCTION

II. PRIMARY RESTRICTIONS ON AUTHORITY

A. THE CONTRACT DISPUTES ACT

Section 605(a)

1. “The authority of this section shall not extend to a claim or dispute for penalties or forfeitures prescribed by statute or regulation which another federal agency is specifically authorized to administer, settle, or determine.”

This exclusionary language included:

- (a) Claims falling under the CDA’s anti-fraud provision, 41 U.S.C. 604.

Martin J. Simko Const., Inc. v. United States, 852 F.2d 540, 545 (Fed. Cir. 1988) (“Section 604 . . . was never intended to be within the purview of the CO.”); Appeal of TDC Management Corp., Dkt. No. 1802; 90-1 BCA P 22,627 (October 25, 1989) (CO has no authority to issue a decision setting forth a government claim under section 604)

- (b) False Claims Act (FCA) disputes and claims.

Martin J. Simko Const., Inc., 852 F.2d at 547-8.

2. “This section shall not authorize any agency head to settle, compromise, pay, or otherwise adjust any claim involving fraud.”

“Agency head” includes their subordinate contracting officers. United States v. United Technologies Corp., No. 5:92-CV-375 (EBB), 1996 U.S. Dist. LEXIS 17398 (D. Conn. October 11, 1996).

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B. THE FEDERAL ACQUISITION REGULATIONS (FAR)

1. FAR 33.210

“The authority to decide or resolve claims does not extend to-- . . . (b) The settlement, compromise, payment or adjustment of any claim involving fraud.”

NOTE: FAR 33.210 “interprets [§ 605(a)] and admonishes the CO not ‘to decide or settle . . . claims arising under or relating to a contract subject to the [CDA].’” Medina Const., Ltd. V. United States, 43 Fed. Cl. 537, 549 n.11 (1999).

2. FAR 49.106

“If the TCO suspects fraud or other criminal conduct related to the settlement of a terminated contract, the TCO shall discontinue negotiations and report the facts under agency procedures.”

C. DEPARTMENT OF JUSTICE LITIGATION AUTHORITY

1. 28 U.S.C. 516

“Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.”

2. Executive Order 6166 (June 10, 1933)

“As to any case referred to the Department of Justice for prosecution or defense in the courts, the function of decision whether and in what manner to prosecute, or to defend, or to compromise, or to appeal, or to abandon prosecution or defense, now exercised by any agency or officer, is transferred to the Department of Justice.”

3. Triggering Event

“Pending” litigation. Hughes Aircraft Co. v. United States, 534 F.2d 889 (1976).

“Litigation becomes pending upon the filing of a complaint with the court.” Ervin And Assoc., Inc. v. United States, 44 Fed. Cl. 646, 654 (1999).

4. Effect On A Contracting Officer

Divests the CO “of any authority to rule on the claim.” Ervin & Assoc., 44 Fed. Cl. at 654.

CO may not issue a final decision on the claim. Case, Inc. v. United states, 88 F.3d 1004 (Fed. Cir. 1996).

CO “lacks jurisdiction to render a decision on the same claim.” Johnson Controls World Services, Inc. v. United States, 43 Fed. Cl. 506, 510 (1999).

CO may not “act in the matter.” Medina Const. Ltd v. United states, 43 Fed. Cl. 537, 552 (1999).

III. DEFINITIONAL ISSUES

A. WHEN DOES THE CLAIM INVOLVE FRAUD IN ORDER TO TRIGGER 41 U.S.C. 605(a)/FAR 33.210(b)?

1. During An Ongoing Investigation

Medina Const., Inc., 43 Fed. Cl. at 550.

2. Possibly As Early As When Fraud Is First “Suspected.”

See UMC Elec. Co. v. United States, 45 Fed. Cl. 507, 509 (1999), aff’d 249 F.3d 1337 (Fed. Cir. 2001); Medina Const., 43 Fed. Cl. at 555; FAR 49.106.

B. HOW FAR DOES SETTTLING, COMPROMISING, ADJUSTING EXTEND?

1. Synonymous With “Decide,” “Resolve,” “Adjudicate,” “Determine,” Etc.

UMC Elec. Co., 45 Fed. Cl. at 509 (CO without authority to “determine” fraud); Medina Const., 43 Fed. Cl. at 549 n.11 (“CO not ‘to decide or settle’”); United States v. United Technologies Corp., 2000 Dist. LEXIS 6219 (Contracting agency may not “consider or resolve” fraud); TDC Mgmt. Corp., 1989 DOT BCA LEXIS 26 (CO cannot make fraud determinations).

2. “Compromise” probably does not extend to actions that would undermine the litigation.

C. WHAT IS THE CLAIM?

1. FCA: very broad definition of a claim

“any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.” 31 U.S.C. § 3729.

2. CDA: claim not defined, relies on FAR 33.201’s claim definition.
3. PROBLEM: FAR 33.201 purports to define a claim for purposes of FAR 33.210(b)

-Routine Request For Payment:	CDA-No	FCA-Yes
-Uncertified Claims Over \$100,000:	CDA-No	FCA-Yes

IV. REOCCURRING FACTUAL SCENARIOS

1. Can A CO Determine Whether Fraud Exists?

NO: UMC Elec. Co., 45 Fed. Cl. at 509; United States Catridge Co., 78 F. Supp. at 83; TDC Mgmt. Corp., 1989 DOT BCA LEXIS 26.

2. After DOJ Declines, Can The CO Resolve The Claim Involving Fraud?

(a) NOT during an ongoing investigation. Medina Const., 43 Fed. Cl. at 550.

(b) NOT if the agents end the investigation with a finding of fraud. 41 U.S.C. 605(a); FAR 33.210(b).

(c) PROBABLY if DOJ determines no fraud exists (rare).

3. What Are The CO's Potential Options, if DOJ Declines But The Agents Find Fraud?

(a) Have DOJ "Bless" The Contract Action/Resolution?

-DOJ technically compromising claim? (Recommended)

(b) Agency "Reevaluates" Their Fraud Determination?

-What if DOJ later wants to plead fraud?

-Why are we really changing our mind?

(c) CO/Agency Moves Forward Unilaterally?

-acting ultra vires?

-CO final decision invalid?

NOTE: "A contracting officer's final decision is invalid when the contracting officer lacked authority to issue it." Case, Inc. v. U.S., 88 F.3d 1004, 1009 (Fed. Cir. 1996).

Further, "an invalid final contracting officer's decision may not serve as the basis for a CDA action." Id.

If the CO lacked authority to issue a final decision, "there can be no valid deemed denial of the claim" Id.

V. CONCLUSION

FISCAL ISSUES IN PROCUREMENT FRAUD

I. INTRODUCTION

II. THE MISCELLANEOUS RECEIPTS STATUTE

Requirement To Return Money To The Treasury

The Miscellaneous Receipts Statute (MRS), 31 U.S.C. 3302, requires that all funds received on behalf of the United States be deposited in the general fund of the U.S. Treasury. Specifically, the MRS provides: “an official or agent of the Government receiving money from the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim.” 31 U.S.C. 3302(b).

MRS applies to “money from the Government *from any source* . . . [t]he original source of the money—whether from private parties or the government—is thus irrelevant.” SATO v. DOD, 87 F.3d 1356, 1362 (D.C. Cir. 1996) (emphasis in original).

Improper obligation and expenditure of such monies constitutes an illegal augmentation of an agency’s appropriated funds. Security Exchange commission—retention of Rebate Resulting From Participation in Energy Savings Program, B-265734, 1996 U.S. Comp. Gen. LEXIS 82 (Feb. 13, 1996), at * 4.

III. EXCEPTIONS

A. Applies Only To The Receipt Of Money

1. Not applicable to agency receipt of goods or services. Bureau of Alcohol, Tobacco, and Firearms – Augmentation of Appropriations – Replacement of Autos By Negligent Third Parties, B-226004, 67 Comp. Gen. 510 (July 12, 1988).
2. Even if money could have been obtained. ATF, supra.
3. No offset required. ATF, supra (Receipt of goods or services does not require an “offsetting transfer from current appropriations to miscellaneous receipts.”).

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B. Statutory Authority To Retain Money The Agency Collects

“However, when an agency is specifically authorized by statute to retain outside moneys it receives, the general rule of the miscellaneous receipts statute does not control.” Availability of Receipts From Synthetic Fuels Project, B-247644, 72 Comp. Gen. 164 (April 9, 1993) (Energy Security Act).

Examples:

1. Criminal Restitution.

The Victim And Witness Protection Act provides restitution to “victims.” 18 U.S.C. 3663, as amended 18 U.S.C. 3663A. Federal agencies are victims for restitution purposes. U. S. v. Lincoln, 277 F.3d 1112 (9th Cir. 2002); U.S. v. Martin, 128 F.3d 1188 (7th Cir. 1997).

2. Energy Efficiency Rebates.

SEC, supra at *5 (Energy Policy Act of 1992 encouraged agencies to participate in energy efficiency programs, permitting them to keep a % of financial incentives/rebates).

3. Revolving Fund

Federal Emergency Management Agency—Disposition of Monetary Award Under False Claims Act, 63 Comp. Gen. 260 (Feb. 16, 1990) (but only *if* enabling legislation expressly authorizes agency to deposit money into the revolving fund).

4. Federal Medical Care Recovery Act, 10 U.S.C. § 1095.

Military Medical Treatment Facilities may retain recoveries from third party payers. Id. at §1095(g)(1).

5. Health Care Fraud And Abuse Control Account

Used to finance antifraud activities in health care; authorized by the Health Insurance Portability And Accountability Act of 1996 (HIPAA), P.L. 104-191.

6. DOJ 3% Debt Collection Fund

DOJ may credit up to 3% of its cash collections from its civil debt collection litigation activities to pay the costs of “processing and tracking” this litigation. Used for asset searches, as well as audits, statistical and analytical assistance. Authorized by section 108 of the DOJ Appropriations Act for FY 1994.

C. Money Received Qualifies As A “REFUND.”

Refunds are defined as “returns of advances, collections for overpayments, adjustments for previous amounts disbursed, or recovery of erroneous disbursements from appropriations or fund accounts that are directly related to, and are reductions of, previously recorded payments from the accounts.” Tennessee Valley Authority—False Claims Act Recoveries, B-281064 (Feb. 14, 2000).

1. Civil False Claims Act

TVA, supra (Recovery of single (actual) damages and investigative costs directly related to the false claim permitted; by award or settlement)

FEMA, supra (FCA settlement; FEMA may retain as a refund single damages, interest on the principle amount of false claims paid, and administrative expenses of investigation).

2. Replacement Contracts

Bureau of Prisons—Dispositions of Funds Paid in Settlement of Breach of Contract Action, B-210160, 62 Comp. Gen. 678 (Sept. 28, 1983) (Excess procurement costs may be used by agency to fund a replacement contract).

Army Corps of Engineers - - Disposition of Funds Collected in Settlement of Faulty Design Dispute, B-220210, 65 Comp. Gen. 838; 1986 U.S. Comp. Gen. LEXIS 584 (Sept. 8, 1986), at *5-6 (Excess procurement costs, obtained as a result of contractor default or defective workmanship, may fund a replacement contract).

National Park Service—Disposition of Performance Bond Forfeited To Government by Defaulting Contractor, B-216688, 64 Comp. Gen. LEXIS 625, at * 6 (June 20, 1985) (Proceeds of performance bond forfeited by contractor may be used by agency to fund replacement contract).

3. Negotiated Contract Resolutions

Securities and Exchange Commission – Reduction of Obligation of Appropriated Funds Due to a Sublease, B-265727 (July 19, 1996) (Contract adjustments or price renegotiations may be treated as refunds when the refund reflects “a change in the amount the government owed its contractor based on the contractor’s performance or a change in the government’s requirements.”)

IV. LIMITATIONS

A. Penalties

Not considered refunds and must be deposited as miscellaneous receipts absent statutory authority to retain. TVA, supra.

B. Replacement Contracts

1. Refunds are credited to the appropriation or fund charged with the original expenditure and replacement contracts are funded only out of that appropriation. Department of Interior-Disposition of Liquidated Damages Collected for delayed Performance, B-242274, 1991 U.S. Comp. Gen. LEXIS 1072 (Aug. 17, 1991) at * 3.
2. There must exist a continuing bona fide need for goods or services covered by the original contract. Department of Interior, supra at *4.
3. The replacement contract must be the same size and scope as the original contract. Department of Interior, supra at *4; Bureau of Prisons, supra (Excess procurement costs may only be used to procure those goods and services that would have been provided under the original, breached contract).

C. “Closed” Appropriation Accounts [Grave Yard Dead]

Appropriation Accounting—Refunds And Collectibles, B-257905, 96-1 Comp. Gen. Proc. Dec. ¶130; 1995 U.S. Comp. Gen. LEXIS 821 (Dec. 26, 1995) at * 2 (If the appropriation account is closed, any recoveries go to the general fund of the Treasury).

D. Program Fraud Civil Remedies Act (PFCRA) Cases, 31 U.S.C. 3801-11

All recoveries returned to Treasury, except for USPO & HHS.

V. CONCLUSION